2007

Indian Gaming and Tribal Sovereignty: Vulnerable, Provisional, Contested

Sandra Faiman-Silva
Bridgewater State University, sfaimansilva@bridgew.edu

Indian Gaming and Tribal Sovereignty: Vulnerable, Provisional, Contested
Sandra Faiman-Silva
Bridgewater State College, November 13, 2007

Indian gaming has again entered our public consciousness and the arena of community debate in Massachusetts, with federal recognition of the Mashpee Wampanoags in March, 2007. This is not the first time that Massachusetts communities have debated Indian gaming. In the 1990s former Attorney General Scott Harshbarger rendered a death blow to tribal gaming initiatives by opining against casino-style gaming proposals brought by another federally recognized tribe: the Martha's Vineyard Aquinna tribe of Wampanoags. This was in spite of the fact that Massachusetts has not been adverse to gaming for profit, and boasts the largest public lottery in the US. Harshbarger's opposition to Indian gaming for its detrimental effects on local, poor communities, seemed at the time to contradict substantial evidence that state lotteries also exploit poorer communities, such as Massachusetts cities Chelsea, Lawrence, and Lowell, whose residents are more likely to buy more lottery tickets per capita than wealthier communities; and their communities receive fewer returns on those investments.

The relationship of Native Americans to gaming in Massachusetts and throughout the US is complex, and not unproblematic, as this conversation will reveal. I will address several questions:

What **rights** do federally recognized tribes have to casino gaming in Massachusetts and elsewhere?

Are Indian rights to entrepreneurial gaming **special rights**, and can they trump the rights of the State Legislature and local communities?

Also, why can the tribe convert land far from Mashpee into part of its tribal estate, and open a casino in Middleboro, when casino gaming is illegal in Massachusetts?

These questions are at the heart of **Indian sovereignty** in the US, a set of rights and privileges that is additionally complicated, often contested, and ever-vulnerable in US legal jurisprudence and in the social imaginary. The final question will be,

"What sovereign rights do Indians possess, and should these rights endure, as Indians transition from the poorest ethnic minority in the US, to – at least for some tribes –a formidable and increasingly successful economic constituency?

Sovereignty for federally recognized tribes has a long and complicated history, which I will quickly summarize. Colonial debates

crystallized around the rights of the First Americas to land and self-determination. Some colonizers viewed the western hemisphere as 'virgin territory' open for the taking (even though it was occupied by millions of First Nations settlers). Others viewed Native Nations as sovereign peoples who enjoyed prior rights of first occupation. Western hemispheric colonizers—French, Dutch, Swedes, Spaniards—came to recognize Indian tribes in the Americas as sovereign, and thereby entered into international treaties, mostly to take their land and/or remove them therefrom. Although the British treated Indians as colonized peoples under international 'just wars' theories, they entered into hundreds of treaties and agreements with American Indians, thus affirming the sovereign status of Indian Nations. An early jurist, William Wirt, said in 1821:

> So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive. We treat them as separate sovereignties, and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territories than we have to enter upon the territory of a foreign prince. (cited in Jaimes 1992:65)

Both the Colonial Articles of Confederation (1781) and the US Constitution affirmed Indian tribes as sovereign, and equated those rights with foreign 'nations.' Between 1778 and 1871 the United States ratified more than 370 treaties with Indian tribes, and after 1871 the federal government entered

into “agreements” with tribes, which too affirmed the Nation to Nation relationship between sovereign governments.

What are these rights of Nations, affirmed in hundreds of colonial and early national documents? According to Wirt (1828, cited in Jaimes 1992:65)

> …their independence is…as absolute as any other nation….Nor can it be conceded that their independence as a nation is a limited independence. *Like all other independent nations,* they have the absolute power of war and peace. *Like all other independent nations*, their territories are inviolable by any other sovereignty…As a nation, they are still free and independent. They are entirely self-governed, self-directed. They treat, or refuse to treat, at their pleasure….(emphasis added by Jaimes).

National sovereignty, then, confers rights to self determination: rights to self-government, economic self-determination, religious rights, and rights to tax businesses. Sovereign rights of nations also include rights to determine who is or is not a citizen of the Nation.

The unequivocal acknowledgement of Indian national sovereignty in early founding documents and laws was not sufficient to protect Indian national sovereignty against the formidable will of the United States, however. As early as the 1820s US leaders and Supreme Court Justices began to articulate more restrictive and more ambiguous definitions of Indian sovereignty. Thomas Jefferson argued that Indians possessed only <u>limited sovereignty</u> determined by the U.S. Government, Congress, and

Courts. In 1823 U.S. Supreme Court Justice John Marshall in a case, Johnson V. McIntosh, ruled that the US holds "inherent and preeminent rights" over Indian land (Jaimes 1992:28). Several cases brought before the Marshall Court in the early 1830s (Cherokee Nation v. Georgia [1831], Worcester vs Georgia [1832]), further eroded Indian national sovereignty, by arguing that Indians existed in a state of quasi-sovereignty as internally colonized wards subject to the federal government's hegemonic trust responsibility. They were, Marshall argued, 'domestic dependent nations,' at the mercy of the executive, legislative, and judicial branches of government.

Since the 1830s Marshall's opinions have provided the context for the perennially vulnerable, provisional, and contested status of Indian national sovereignty in the US and even globally. Legislative Acts and legal opinions throughout the late 19th and 20th Centuries have eroded tribal sovereignty. Most notable are the 1886 federal court opinion rendered in United States vs. Kagama (1886), which strengthened US 'plenary powers' over Indian tribes; the General Allotment Act of 1887 [the Dawes Severalty Act], which gave the US power to terminate tribes and allot tribal land in severalty; the case Lonewolf V. Hitchcock (1903), which opined that the US could abrogate undesirable portions of treaties at any time without Indian

consent; and the Termination Act (1953) [House Concurrent Resolution 108], unilaterally terminated over 109 tribes or portions of tribes (see Jaimes 1992:13-21).

As earlier noted, Native Americans under international law have not fared much better in seeking to protect their sovereign rights as Nations. Unlike colonized peoples elsewhere, Native Americans have been unable to benefit from Post World War II international discourse which spelled out rights of formerly colonized peoples to national liberation. Under a so-called 'blue water thesis' in international law, colonies and the peoples who inhabit them are defined in ways that have excluded US tribes. Colonies are defined by the 'salt water' or blue water thesis' as world regions that are outside of the territorial boundaries of colonizing nations, separated by oceans or seas. In a semantic twist, then, American Indians have not been able to secure protections national sovereign rights under international law. In the 1970s Native Americans began to lobby the U.N. Commission on Human Rights claiming that the U.S. violated tribal fundamental rights of Indian Nations in the U.S under international laws which have liberated many formerly colonized peoples throughout Asia and Africa. The UN International Commission for Human Rights has treaded lightly on American Indian claims, because of the formidable power of the US and this

country's assertion that US Native American tribes enjoy only 'limited sovereignty' within the broader jurisdictional authority of the US government.

Tribes and States

Federally recognized Indian tribes in the US, like States, benefit from a "government to government' relationship with the US government. Tribes do not pay property taxes on tribal land. Federally recognized tribes receive various benefits and entitlements, spelled out in the hundreds of Treaties (and after 1871, Agreements) entered into with the US government. Among the benefits of tribal status are rights to economic self-determination, affirmed in the 1975 Indian Self-Determination and Education Assistance Act. This Act gave tribes an increased role in economic self-determination, including rights to take over Indian hospital administration; rights to enter into economic development projects, increased tribal control over trust funds and other tribal assets, although oversight authority remains with the US Department of the Interior and the Bureau of Indian Affairs (BIA).

Passage of the 1988 Indian Gaming Regulatory Act, a by-product of the 1975 Act mentioned earlier, affirmed tribal rights to operate gambling casinos in states where similar operations were legal. This Act opened the

door for tribes to cash in on an industry that was taking off in the US, and is now the fastest growing leisure sector of the US economy.

Tribal sovereignty, then, is as we have seen, a kind of "quasi-sovereignty," ever at the mercy of the United States Congress, Courts, and Executive. Native Americans enjoy legal rights under treaties, agreements, Acts of Congress (such as the 1975 Indian Economic Self-Determination Act) and the 1988 Indian Gaming Regulatory Act). All of these treaties and agreements, and even Congressional Acts can be abrogated by Acts of Congress, Executive Order, or Court decisions; and therefore tribal self determination remains provisional and vulnerable.

Today tribal sovereignty is further complicated by several developments in Indian Country: **First** tribal members are becoming more diverse and many would argue, less "Indian." The numbers of Indians who speak their native languages is decreasing dramatically, and some tribal languages are virtually extinct. More Indians today are of mixed heritage than ever before, and many tribes count as members Indians with any degree of 'traceable descent,' rather than the BIA mandated ¼ degree of Indian blood. Also, many Indians have left their reservation communities altogether and now live in urban areas, connecting with their tribes only minimally or marginally. So, who constitutes an Indian if Indians don't

speak their native language, don't appear phenotypically to be Indian, don't practice their Indian cultural ways, and don't live in Indian communities?

Second, some Indian tribes have become extremely wealthy as a result of legalized gambling operations and other successfully entrepreneurial ventures. Are these tribes still entitled to treaty-mandated tribal benefits, now that they earn more than average non-Indian Americans?

Indian rights, perhaps more than ever, are vulnerable, provisional, and contested, as our notions of what is an Indian are contested; and as Americans face the reality that Indians may indeed beat white folks at their own profit-making games. Will the US courts, congress, and the executive still honor those treaties and agreements that have endured as a legacy of our colonial past? I certainly hope so.